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1 **6.0 Section 1981 Introductory Instruction**

2 **Model**

3 In this case the Plaintiff _____ has made a claim under the Federal Civil Rights statute that
4 prohibits discrimination against [an employee] [an applicant for employment] because of the
5 person’s race.

6 Specifically, [plaintiff] claims that [he/she] was [describe the employment action at issue]
7 by defendant[s] _____ because of [plaintiff’s] race.

8 [Defendant] denies that [plaintiff] was discriminated against in any way. Further, [defendant]
9 asserts that [describe any affirmative defenses].

10 I will now instruct you more fully on the issues you must address in this case.

11 **Comment**

12 Referring to the parties by their names, rather than solely as “Plaintiff” and “Defendant,” can
13 improve jurors’ comprehension. In these instructions, bracketed references to “[plaintiff]” or
14 “[defendant]” indicate places where the name of the party should be inserted.

15 42 U.S.C. § 1981 prohibits race discrimination in the making and enforcing of contracts. It
16 prohibits racial discrimination against whites as well as nonwhites. *See McDonald v. Santa Fe Trail*
17 *Transp. Co.*, 427 U.S. 273, 295 (1976) (Section 1981 was intended to "proscribe discrimination in
18 the making or enforcement of contracts against, or in favor of, any race"). In *Runyon v. McCrary*,
19 427 U.S. 160 (1976), the Supreme Court held that Section 1981 regulated private conduct as well
20 as governmental action.

21 In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court restricted
22 the application of Section 1981 to claims arising out of the formation of the contract. But the Civil
23 Rights Act of 1991 legislatively overruled the Supreme Court's decision in *Patterson*, providing that
24 the clause "to make and enforce contracts" in Section 1981 "includes the making, performance,
25 modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and
26 conditions of the contractual relationship." 42 U.S.C. § 1981(b).

27 The protections afforded by Section 1981 may in many cases overlap with those of Title VII.
28 But the standards and protections of the two provisions are not identical. For example, a Section
29 1981 plaintiff does not have to fulfill various prerequisites, including the completion of the EEOC

1 administrative process, before bringing a court action. Also, Title VII applies only to employers with
2 15 or more employees, whereas Section 1981 imposes no such limitation. Employees cannot be sued
3 under Title VII, but they can be sued under Section 1981. On the other hand, Title VII protects
4 against discrimination on the basis of sex, creed or color as well as race, while Section 1981
5 prohibits racial discrimination only. Title VII and Section 1981 are subject to different limitations
6 periods as well. See *Cardenas v. Massey*, 269 F.3d 251, 266 (3d Cir. 2001).

7 For ease of reference, these pattern instructions provide a separate set of instructions
8 specifically applicable to Section 1981 claims. But where both Section 1981 and Title VII are both
9 applicable, and the instructions for both provisions are substantively identical, there is no need to
10 give two sets of instructions. In such cases, these Section 1981 instructions can be used because the
11 claim will have to be one sounding in race discrimination. The Comment will note if a Section 1981
12 instruction is substantively identical to a Title VII instruction.

1 **6.1.1 Elements of a Section 1981 Claim— Disparate Treatment —Mixed-**
2 **Motive**

3 **Model**

4 In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment]
5 [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant],
6 [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that
7 [plaintiff] must prove that [his/her] race was a motivating factor in [defendant's] decision [describe
8 action] [plaintiff].

9 To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of
10 the evidence:

11 First: [Defendant] [failed to hire] [failed to promote] [demoted] [terminated] [constructively
12 discharged] [plaintiff]; and

13 Second: [Plaintiff's] race was a motivating factor in [defendant's] decision.

14 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate,
15 [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate
16 [plaintiff's] federal civil rights.

17 In showing that [plaintiff's] race was a motivating factor for [defendant's] action, [plaintiff]
18 is not required to prove that [his/her] race was the sole motivation or even the primary motivation
19 for [defendant's] decision. [Plaintiff] need only prove that [his/her] race played a motivating part
20 in [defendant's] decision even though other factors may also have motivated [defendant].

21 As used in this instruction, [plaintiff's] race was a “motivating factor” if [his/her] race played
22 a part [or played a role] in [defendant's] decision to [state adverse employment action] [plaintiff].
23

24 **[For use where defendant sets forth a “same decision” affirmative defense:**

25 If you find in [plaintiff's] favor with respect to each of the facts that [plaintiff] must prove,
26 you must then decide whether [defendant] has shown that [defendant] would have made the same
27 decision with respect to [plaintiff's] employment even if there had been no racially discriminatory
28 motive. Your verdict must be for [defendant] if [defendant] proves by a preponderance of the
29 evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff's] race had
30 played no role in the employment decision.]

1 **Comment**

2 The distinction between “mixed-motive” cases and “pretext” cases is generally determined
3 by whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If the
4 plaintiff produces direct evidence of discrimination, this is sufficient to show that the defendant’s
5 activity was motivated at least in part by racial animus, and therefore a “mixed-motive” instruction
6 is given. If the evidence of discrimination is only circumstantial, then defendant can argue that there
7 was no racial animus at all, and that its employment decision can be explained completely by a non-
8 discriminatory motive; it is then for the plaintiff to show that the alleged non-discriminatory motive
9 is a pretext, and accordingly Instruction 6.1.2 should be given. *See generally Fakete v. Aetna, Inc.*,
10 308 F.3d 335 (3d Cir. 2002) (using “direct evidence” to describe “mixed-motive” cases and noting
11 that pretext cases arise when the plaintiff presents only indirect or circumstantial evidence of
12 discrimination); *Glanzman v. Metropolitan Management Corp.*, 391 F.3d 506 (3d Cir. 2004) (same).

13 *Same Decision Defense*

14 Section 107 of the Civil Rights Act of 1991 (42 U.S.C. §2000e-(5)(g)(2)(B)) changed the law
15 on “mixed-motive” liability in Title VII actions. Previously, a defendant could escape liability by
16 proving the “same decision” would have been made even without a discriminatory motive. The Civil
17 Rights Act of 1991 provides that a “same decision” defense precludes an award for money damages,
18 but not liability.

19 The Eleventh Circuit has held that the change wrought by the Civil Rights Act of 1991 does
20 not apply to Section 1981 actions. *Mabra v. United Food & Comm. Workers Union No. 1996*, 176
21 F.3d 1357, 1358 (11th Cir. 1999). The Court parsed the 1991 Act and concluded that while Congress
22 had amended the mixed-motive provisions in Title VII, it had not amended them in Section 1981:

23 Enacted as part of the Civil Rights Act of 1991 (“1991 Act”), the mixed-motive amendments
24 specifically add two provisions to the text of Title VII; they make no amendment or addition
25 to § 1981. See Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071, 1075 (1991)
26 (codified as amended at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B)). In contrast, the portion
27 of the 1991 Act amending § 1981 by adding two new subsections to the text of that statute
28 makes no mention of any change in the mixed-motive analysis in § 1981 cases. *Id.* at 1071-
29 72.

30 The amendments to Section 1981 that were added by the 1991 Act and cited by the *Mabra*
31 court were:

32 (b) For purposes of this section, the term “make and enforce contracts” includes the making,
33 performance, modification, and termination of contracts, and the enjoyment of all benefits,
34 privileges, terms, and conditions of the contractual relationship.

1 (c) The rights protected by this section are protected against impairment by nongovernmental
2 discrimination and impairment under color of State law.

3 The Eleventh Circuit pattern instruction accordingly provides that if the jury finds that the same
4 decision would have been made, the jury must find for the defendant. See Eleventh Circuit Pattern
5 Jury Instruction 1.3.1. The Eighth Circuit pattern instruction is to the same effect. See Eighth Circuit
6 Pattern Instruction 5.2.1.

7 The question of the impact of the “same decision” defense in Section 1981 cases has not been
8 decided in the Third Circuit. The pattern instruction sets forth the “same decision” defense as one
9 that precludes liability, and thus differentiates it from the “same decision” defense in Title VII
10 actions. It is true that the Third Circuit has held generally that the liability standards for Section 1981
11 and Title VII are identical, see *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1115 (3d Cir. 1988)
12 (noting that the Third Circuit in *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir.1983) “held
13 that the legal standards established in § 1981 cases and Title VII cases are interchangeable.”). But
14 the cases establishing this premise were decided before the Civil Rights Act of 1991. As the Eleventh
15 Circuit’s construction of that Act’s effect on the “same decision” defense is the only Circuit Court
16 opinion on the subject, the Committee determined that the instruction should track that decision,
17 until the Third Circuit or the Supreme Court determines otherwise.

18 It should be noted that Third Circuit cases have held that the mixed-motive amendments are
19 not applicable to other employment provisions that were not specifically and directly amended by
20 Section 107. See, e.g., *Woodson v. Scott Paper Co.*, 109 F.3d 913, 931-35 (3d Cir. 1997) (holding
21 that Section 107 does not change the legal standards applicable to Title VII retaliation actions);
22 *Glanzman v. Metropolitan Mgmt. Corp.*, 391 F.3d 506, 512 n.3 (3d Cir. 2004) (stating that Section
23 107 of the 1991 Act does not apply to ADEA cases). These rulings lend weight to the conclusion that
24 the 1991 Civil Rights Act did not change the effect of the “same decision” defense in Section 1981
25 cases.

1 **6.1.2 Elements of a Section 1981 Claim— Disparate Treatment— Pretext**

2 **Model**

3 In this case [plaintiff] is alleging that [describe alleged disparate treatment] [plaintiff]. In
4 order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must
5 prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must
6 prove that [his/her] race was a determinative factor in [defendant’s] decision to [describe action]
7 [plaintiff].

8 To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of
9 the evidence:

10 First: [Defendant] [failed to hire] [failed to promote] [demoted] [terminated] [constructively
11 discharged] [plaintiff]; and

12 Second: [Plaintiff’s] race was a determinative factor in [defendant’s] decision.

13
14 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate,
15 [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate
16 [plaintiff’s] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of
17 intent, such as statements admitting discrimination. Intentional discrimination may be inferred from
18 the existence of other facts.

19 [For example, you have been shown statistics in this case. Statistics are one form of evidence
20 from which you may find, but are not required to find, that a defendant intentionally discriminated
21 against a plaintiff. You should evaluate statistical evidence along with all the other evidence received
22 in the case in deciding whether [defendant] intentionally discriminated against [plaintiff]].

23 [Defendant] has given a nondiscriminatory reason for its [describe defendant’s action]. If
24 you disbelieve [defendant’s] explanations for its conduct, then you may, but need not, find that
25 [plaintiff] has proved intentional discrimination. In determining whether [defendant’s] stated reason
26 for its actions was a pretext, or excuse, for discrimination, you may not question [defendant’s]
27 business judgment. You cannot find intentional discrimination simply because you disagree with the
28 business judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider
29 [defendant’s] wisdom. However, you may consider whether [defendant’s] reason is merely a cover-up
30 for discrimination.

31 Ultimately, you must decide whether [plaintiff] has proven that [his/her] race was a
32 determinative factor in [defendant’s employment decision.] “Determinative factor” means that if not
33 for [plaintiff’s] race, the [adverse employment action] would not have occurred.

1 **Comment**

2 This instruction is to be used when the plaintiff's proof of discrimination is circumstantial
3 rather than direct. See the Comment to Instruction 6.1.1. The instruction is substantively identical
4 to the pretext instruction given for Title VII cases. See Instruction 5.1.2. Where the plaintiff seeks
5 recovery under both Title VII and Section 1981, this instruction may be given for both causes of
6 action.

7 Discriminatory intent is required to support a claim under Section 1981. *Patterson v. McLean*
8 *Credit Union*, 491 U.S. 164, 186 (1989); *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)
9 (criteria for establishing a prima facie case of disparate treatment under Title VII are applicable to
10 Section 1981 cases as a means of showing discriminatory intent). See also *Goodman v. Lukens Steel*
11 *Co.*, 777 F.2d 113, 135 (3d Cir. 1985) (Section 1981 requires a showing of intent to discriminate on
12 the basis of race); *Stehney v. Perry*, 101 F.3d 925, 937 (3d Cir.1996) ("[A] facially neutral policy
13 does not violate equal protection solely because of disproportionate effects" because Section 1981
14 provides a cause of action "for intentional discrimination only.").

15 When articulating a legitimate, nondiscriminatory reason for its action, the defendant is only
16 required to introduce evidence that creates a question of fact as to whether the proffered reason or
17 race was the motivating factor. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 (1992). See
18 also *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509 (3d Cir.1993) (pretext turns on the
19 qualifications and criteria identified by the employer, not the categories the plaintiff considers
20 important). If the defendant meets this burden, the plaintiff must persuade the jury that the
21 defendant's stated reason was merely a pretext for race discrimination, or in some other way prove
22 it is more likely than not that race motivated the employer. *Texas Dept. of Community Affairs v.*
23 *Burdine*, 450 U.S. 248, 253 (1981). The plaintiff retains the ultimate burden of persuading the jury
24 of intentional discrimination. The factfinder's rejection of the employer's proffered reason allows,
25 but does not compel, judgment for the plaintiff. *Sheridan v. E.I. DuPont de Nemours and Co.*, 100
26 F.3d 1061, 1066-67 (3d Cir.1996) (en banc).

27 In *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 279 (3d Cir.1998), the court held that the
28 question of whether the defendant has met its intermediate burden of production under the
29 *McDonnell Douglas* test is a "threshold matter to be decided by the judge."

30 For further commentary on the standards applicable to pretext cases, see the Comment to
31 Instruction 5.1.2.

1 **6.1.3 Elements of a Section 1981 Claim — Harassment —Hostile Work**
2 **Environment — Tangible Employment Action**

3 **Model**

4 [Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this
5 harassment was motivated by [plaintiff's] race. [Defendant(s)] [is/are] liable for racial harassment
6 if [plaintiff] proves all of the following elements by a preponderance of the evidence:

7 First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to
8 plaintiff's claim] by [names].

9 Second: [Names] conduct was not welcomed by [plaintiff].

10 Third: [Names] conduct was motivated by the fact that [plaintiff] is [race].

11 Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's]
12 position would find [plaintiff's] work environment to be hostile or abusive. This element
13 requires you to look at the evidence from the point of view of a reasonable [member of
14 plaintiff's race] reaction to [plaintiff's] work environment.

15 Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of
16 [names] conduct.

17 Sixth: [Plaintiff] suffered an adverse “tangible employment action” as a result of the hostile
18 work environment; a tangible employment action is defined as a significant change in
19 employment status, such as hiring, firing, failing to promote, reassignment with significantly
20 different responsibilities, or a decision causing significant change in benefits.

21 **[For use with respect to the employer when the alleged harassment is by non-supervisory**
22 **employees:**

23 However, as to [employer], because [names of alleged harassers] are not supervisors, you
24 must also determine whether [employer] is responsible under the law for those acts. For [employer]
25 to be liable for the acts of harassment of non-supervisor employees, [plaintiff] must prove by a
26 preponderance of the evidence that management level employees knew, or should have known, of
27 the abusive conduct. Management level employees should have known of the abusive conduct if 1)
28 an employee provided management level personnel with enough information to raise a probability
29 of racial harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive
30 and open that a reasonable employer would have had to be aware of it.]

1 **Comment**

2 The standards for a hostile work environment claim are identical under Title VII and Section
3 1981. See, e.g., *Verdin v. Weeks Marine Inc.*, 124 Fed. Appx. 92, 95 (3d Cir. 2005) (“Regarding
4 Verdin's hostile work environment claim, the same standard used under Title VII applies under
5 Section 1981. See *McKenna v. Pac. Rail Serv.*, 32 F.3d 820, 826 n. 3 (3d Cir.1994).”); *Ocasio v.*
6 *Lehigh Valley Family Health Center*, 92 Fed.Appx. 876, 879-80 (3d Cir. 2004) (“As amended by
7 the 1991 Civil Rights Act, § 1981 now encompasses hostile work environment claims, and we apply
8 the same standards as in a similar Title VII claim.”).

9 However, while the standards of liability are identical, there is a major difference in the
10 coverage of the two provisions. Under Title VII, only employers can be liable for discrimination in
11 employment. In contrast, Section 1981 prohibits individuals, including other employees, from racial
12 discrimination against an employee. See *Cardenas v. Massey*, 269 F.3d 251, 268 (3d Cir. 2001)
13 (“Although claims against individual supervisors are not permitted under Title VII, this court has
14 found individual liability under § 1981 when [the defendants] intentionally cause an infringement
15 of rights protected by Section 1981, regardless of whether the [employer] may also be held liable.”);
16 *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 518 (3d Cir. 1986) (“employees of a corporation
17 may become personally liable when they intentionally cause an infringement of rights protected by
18 Section 1981, regardless of whether the corporation may also be held liable”). Accordingly, the
19 instruction modifies the instruction used for Title VII hostile work environment claims, to specify
20 that individual employees can be liable for acts of racial harassment. See Instruction 5.1.4.

21 If the court wishes to provide a more detailed instruction on what constitutes a hostile work
22 environment, such an instruction is provided in 6.2.2.

23 It should be noted that constructive discharge is the adverse employment action that is most
24 common with claims of hostile work environment. Instruction 6.2.3 provides an instruction setting
25 forth the relevant factors for a finding of constructive discharge. That instruction can be used to
26 amplify the term “adverse employment action” in appropriate cases.

27 The instruction’s definition of “tangible employment action” is taken from *Burlington*
28 *Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

29 *Liability for Non-Supervisors*

30 Respondeat superior liability for discriminatory harassment by non-supervisory employees
31 exists only where "the defendant knew or should have known of the harassment and failed to take
32 prompt remedial action." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990). See
33 also *Kunin v. Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999):

34 [T]here can be constructive notice in two situations: where an employee provides
35 management level personnel with enough information to raise a probability of . . .

1 harassment in the mind of a reasonable employer, or where the harassment is so pervasive
2 and open that a reasonable employer would have had to be aware of it. We believe that these
3 standards strike the correct balance between protecting the rights of the employee and the
4 employer by faulting the employer for turning a blind eye to overt signs of harassment but
5 not requiring it to attain a level of omniscience, in the absence of actual notice, about all
6 misconduct that may occur in the workplace.

7 _____
8 *Severe or Pervasive Activity*

9 The terms “severe or pervasive” set forth in the instruction are in accord with Supreme Court
10 case law and provide for alternative possibilities for finding harassment. See *Jensen v. Potter*, 435
11 F.3d 444, 447, n.3 (3d Cir. 2006) (“The disjunctive phrasing means that ‘severity’ and
12 ‘pervasiveness’ are alternative possibilities: some harassment may be severe enough to contaminate
13 an environment even if not pervasive; other, less objectionable, conduct will contaminate the
14 workplace only if it is pervasive.”) (quoting 2 C.Sullivan et. al., *Employment Discrimination Law*
15 *and Practice* 455 (3d ed. 2002).

16 *Subjective and Objective Components*

17 The Supreme Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), explained that
18 a hostile work environment claim has both objective and subjective components. A hostile
19 environment must be “one that a reasonable person would find hostile and abusive, and one that the
20 victim in fact did perceive to be so.” The instruction accordingly sets forth both objective and
21 subjective components.

22 *Hostile Work Environment That Pre-exists the Plaintiff’s Employment*

23 The instruction refers to harassing “conduct” that “was motivated by the fact that [plaintiff]
24 is a [plaintiff’s race].” This language is broad enough to cover the situation where the plaintiff is the
25 first member of the plaintiff’s race to enter the work environment, and the working conditions pre-
26 existed the plaintiff’s employment. In this situation, the “conduct” is the refusal to change an
27 environment that is hostile to member of the plaintiff’s race. The court may wish to modify the
28 instruction so that it refers specifically to the failure to correct a pre-existing environment.

1 *Quid Pro Quo Claims*

2 These Section 1981 instructions do not include a pattern instruction for quid pro quo claims.
3 This is because quid pro quo claims are almost invariably grounded in sex discrimination, and
4 Section 1981 applies to racial discrimination only. Where a Section 1981 claim is raised on quid pro
5 quo grounds, the court can use Instruction 5.1.3, with the proviso that it must be modified if the
6 supervisor is also being sued for individual liability.

1 **6.1.4 Elements of a Section 1981 Claim— Harassment — Hostile Work**
2 **Environment — No Tangible Employment Action**

3 **Model**

4 [Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this
5 harassment was motivated by [plaintiff's] race.

6 [Defendant(s)] [is/are] liable for racial harassment if [plaintiff] proves all of the following
7 elements by a preponderance of the evidence:

8 First: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to
9 plaintiff's claim] by [names].

10 Second: [names] conduct was not welcomed by [plaintiff].

11 Third: [names] conduct was motivated by the fact that [plaintiff] is [race].

12 Fourth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's]
13 position would find [plaintiff's] work environment to be hostile or abusive. This element
14 requires you to look at the evidence from the point of view of a reasonable [member of
15 plaintiff's race] reaction to [plaintiff's] work environment.

16 Fifth: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of
17 [names] conduct.

18 **[For use when the alleged harassment is by non-supervisory employees:**

19 However, as to [employer], because [names of harassers] are not supervisors, you must also
20 determine whether [employer] is responsible under the law for those acts. For [employer] to be liable
21 for the acts of harassment of non-supervisor employees, plaintiff must prove by a preponderance of
22 the evidence that management level employees knew, or should have known, of the abusive
23 conduct. Management level employees should have known of the abusive conduct if 1) an employee
24 provided management level personnel with enough information to raise a probability of racial
25 harassment in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open
26 that a reasonable employer would have had to be aware of it.]

27 If any of the above elements has not been proved by a preponderance of the evidence, your
28 verdict must be for [defendant(s)] and you need not proceed further in considering this claim. If you

1 find that the elements have been proved, then you must consider [employer's] affirmative defense.
2 I will instruct you now on the elements of that affirmative defense.

3 With respect to [employer] you must find for [employer] if you find that [employer] has
4 proved both of the following elements by a preponderance of the evidence:

5 First: That [employer] exercised reasonable care to prevent racial harassment in the
6 workplace, and also exercised reasonable care to promptly correct the harassing behavior that
7 does occur.

8 Second: That [plaintiff] unreasonably failed to take advantage of any preventive or
9 corrective opportunities provided by [employer].

10 Proof of the following facts will be enough to establish the first element that I just referred
11 to, concerning prevention and correction of harassment:

12 1. [Employer] had established an explicit policy against harassment in the workplace
13 on the basis of race.

14 2. That policy was fully communicated to its employees.

15 3. That policy provided a reasonable way for [plaintiff] to make a claim of
16 harassment to higher management.

17 4. Reasonable steps were taken to correct the problem, if raised by [plaintiff].

18 On the other hand, proof that [plaintiff] did not follow a reasonable complaint procedure
19 provided by [employer] will ordinarily be enough to establish that [plaintiff] unreasonably failed to
20 take advantage of a corrective opportunity.

21 The defense of having an effective procedure for handling racial discrimination complaints
22 is available to the employer only. It has nothing to do with the individual liability of employees for
23 acts of racial discrimination.

24 **Comment**

25 As discussed in the Comment to 6.1.3, the Third Circuit as well as other courts have held that
26 the standards for a hostile work environment claim are identical under Title VII and Section 1981.

1 However, as also discussed in that Comment, Section 1981 prohibits individuals, including
2 employees, from engaging in acts of racial discrimination. Therefore this instruction modifies the
3 instruction used for Title VII hostile work environment claims, to specify that individual employees
4 can be liable for acts of racial discrimination in creating a hostile work environment. See Instruction
5 5.1.5.

6 If the court wishes to provide a more detailed instruction on what constitutes a hostile work
7 environment, such an instruction is provided in 6.2.2.

8 This instruction is to be used in racial harassment cases where the plaintiff did not suffer any
9 "tangible" employment action such as discharge or demotion, but rather suffered "intangible" harm
10 flowing from harassment that is "sufficiently severe or pervasive to create a hostile work
11 environment." *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998). In *Faragher* and in *Burlington*
12 *Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court held that an employer is strictly liable for
13 supervisor harassment that "culminates in a tangible employment action, such as discharge,
14 demotion, or undesirable reassignment." *Ellerth*, 524 U.S. at 765. But when no such tangible action
15 is taken, the employer may raise an affirmative defense to liability. To prevail on the basis of the
16 defense, the employer must prove that "(a) [it] exercised reasonable care to prevent and correct
17 promptly any [discriminatory] harassing behavior," and that (b) the employee "unreasonably failed
18 to take advantage of any preventive or corrective opportunities provided by the employer or to avoid
19 harm otherwise." *Ellerth*, 524 U.S. at 751 (1998). See *Swinton v. Potomac Corp.*, 270 F.3d 794, 817
20 (9th Cir.2001) (holding that the *Faragher/Ellerth* defense applies to Section 1981 actions in the same
21 manner as in Title VII actions).

22 Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment
23 action also justifies requiring the plaintiff to prove a further element, in order to protect the employer
24 from unwarranted liability for the discriminatory acts of its non-supervisor employees. Respondent
25 superior liability for the acts of non-supervisory employees exists only where "the defendant knew
26 or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City*
27 *of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990).

28 In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 138-41 (2004), the Court considered
29 the relationship between constructive discharge brought about by supervisor harassment and the
30 affirmative defense articulated in *Ellerth* and *Faragher*. The Court concluded that "an employer does
31 not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act
32 precipitates the constructive discharge; absent such a 'tangible employment action,' however, the
33 defense is available to the employer whose supervisors are charged with harassment."

1 **6.1.5 Elements of a Section 1981 Claim — Disparate Impact**

2 *No Instruction*

3 **Comment**

4 Section 1981 requires proof of intentional discrimination. Thus, there is no cause of action
5 for disparate impact under section 1981. *See, e.g., Pollard v. Wawa Food Market*, 366 F. Supp.2d
6 247, 252 (E.D.Pa. 2005)(concluding that disparate impact claims “are not actionable under section
7 1981" because section 1981 requires proof of discriminatory motive, and disparate impact claims
8 do not).

1 **6.1.6 Elements of a Section 1981 Claim — Retaliation**

2 **Model**

3 [Plaintiff] claims that [defendant(s)] discriminated against [him/her] because of [plaintiff's]
4 [describe protected activity].

5 To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of
6 the evidence:

7 First: [Plaintiff] [describe activity protected by Section 1981].

8 Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the
9 protected conduct took place.

10 Third: There was a causal connection between [describe challenged activity] and [plaintiff's]
11 [describe plaintiff's protected activity].

12 Concerning the first element, [plaintiff] need not prove the merits of [his/her] [describe
13 plaintiff's activity], but only that [he/she] was acting under a good faith belief that [plaintiff's] [or
14 someone else's] right to be free from racial discrimination was violated.

15 Concerning the second element, the term “materially adverse” means that [plaintiff] must
16 show [describe alleged retaliatory activity] was serious enough that it well might have discouraged
17 a reasonable worker from [describe plaintiff's protected activity]. [The activity need not be related
18 to the workplace or to [plaintiff's] employment.]

19 Concerning the third element, that of causal connection, that connection may be shown in
20 many ways. For example, you may or may not find that there is a sufficient connection through
21 timing, that is [defendant(s)] action followed shortly after [defendant(s)] became aware of
22 [plaintiff's] [describe activity]. Causation is, however, not necessarily ruled out by a more extended
23 passage of time. Causation may or may not be proven by antagonism shown toward [plaintiff] or
24 a change in demeanor toward [plaintiff].

25 Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative
26 effect on [describe alleged retaliatory activity]. “Determinative effect” means that if not for
27 [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

1 **Comment**

2 Unlike Title VII, Section 1981 does not contain a specific statutory provision prohibiting
3 retaliation. But But the Supreme Court has held that retaliation claims are cognizable under Section
4 1981 despite the absence of specific statutory language. *CBOCS West, Inc. v. Humphries*, 128 S.Ct.
5 1951 (2008). And the Third Circuit has held that the legal standards for a retaliation claim under
6 Section 1981 are the same as those applicable to a Title VII retaliation claim. *See, e.g., Cardenas v.*
7 *Massey*, 269 F.3d 251, 263 (3d Cir. 2001); *Khair v. Campbell Soup Co.*, 893 F. Supp. 316, 335-
8 36 (D.N.J. 1995) (noting that with respect to retaliation claims, “The Civil Rights Act of 1991
9 extended § 1981 to the reaches of Title VII.”).

10 Where the plaintiff seeks recovery under both Title VII and Section 1981 for retaliation, this
11 instruction may be given for both causes of action. It should be noted, however, that a claim under
12 Section 1981 can be brought against an individual as well as the employer. Therefore a plaintiff
13 might bring a retaliation claim not only against the employer but also against the employee who took
14 the allegedly retaliatory action. It would then be appropriate to instruct the jury that while it can
15 impose liability on the individual under Section 1981, it cannot do so under Title VII.

16 The most common activities protected from retaliation under Section 1981 and Title VII are:
17 1) opposing unlawful discrimination; 2) making a charge of employment discrimination; 3)
18 testifying, assisting or participating in any manner in an investigation, proceeding or hearing under
19 Section 1981. See the discussion of protected activity in the Comment to Instruction 5.1.7. *See also*
20 *Glanzman v. Metropolitan Management Corp.*, 391 F.3d 506 (3d Cir. 2004) (if plaintiff were fired
21 for being a possible witness in an employment discrimination action, this would be unlawful
22 retaliation) (ADEA); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir. 1997) (filing
23 discrimination complaint constitutes protected activity), *overruled on other grounds by Burlington*
24 *N. & S.F. Ry. Co. v. White*, 126 S.Ct. 2405 (2006); *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d
25 173, 177 (3rd Cir. 1997) (advocating equal treatment was protected activity); *Aman v. Cort Furniture*,
26 85 F.3d 1074, 1085 (3d Cir. 1989) (“protesting what an employee believes in good faith to be a
27 discriminatory practice is clearly protected conduct”). The question of whether a particular activity
28 is “protected” from retaliation is a question of law; whether the plaintiff engaged in that activity is
29 a question of fact for the jury.

30 The Third Circuit has held that for a retaliation claim, the court must instruct the jury that the
31 plaintiff’s protected activity must have had a “determinative effect” on the employer’s decision.
32 *Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (1997) (holding that the “mixed-motive”
33 amendments to the Civil Rights Act of 1991 do not apply to retaliation claims, and therefore that
34 “the district court abused its discretion in failing to instruct the jury that improper motive must have
35 had a determinative effect on the decision to fire Woodson.”) The pattern instruction accordingly
36 includes a “determinative effect” instruction.

37 *Standard for Actionable Retaliation*

1 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 126 S.Ct. 2405, 2415 (2006), held
2 that a cause of action for retaliation under Title VII lies whenever the employer responds to protected
3 activity in such a way “that a reasonable employee would have found the challenged action
4 materially adverse, which in this context means it well might have dissuaded a reasonable worker
5 from making or supporting a charge of discrimination.” (citations omitted). The Court in *White* also
6 held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court
7 rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse
8 employment action in order to recover for retaliation. Because the standards for retaliation claims
9 under Section 1981 have been equated to those applicable to Title VII, the instruction is written to
10 comply with the standard for actionable retaliation in *White*. For a more complete discussion of
11 *White*, see the Comment to Instruction 5.1.7

1 **6.1.7 Elements of a Section 1981 Claim — Municipal Liability — Custom or**
2 **Policy**

3 **Model**

4 If you find that [plaintiff] suffered racial discrimination in employment, [government entity]
5 is liable for that discrimination if [plaintiff] proves by a preponderance of the evidence that the
6 discrimination resulted from [government entity’s] official policy or custom – in other words, that
7 [government entity’s] official policy or custom caused the discrimination.

8 It is not enough for [plaintiff] to show that [government entity] employed a person who
9 violated [plaintiff’s] rights. [Plaintiff] must show that the violation resulted from [government
10 entity’s] official policy or custom. “Official policy or custom” includes any of the following [*include*
11 *any of the following theories that are warranted by the evidence*]:

- 12 ● a rule or regulation promulgated, adopted, or ratified by [government entity’s] legislative
13 body;
- 14 ● a policy statement or decision that is officially made by [government entity’s]
15 [policy-making official];
- 16 ● a custom that is a widespread, well-settled practice that constitutes a standard operating
17 procedure of [government entity]; or
- 18 ● [inadequate training] [inadequate supervision] [inadequate screening during the hiring
19 process] [failure to adopt a needed policy]. However, [inadequate training] [inadequate
20 supervision] [inadequate screening during the hiring process] [failure to adopt a needed
21 policy] does not count as “official policy or custom” unless the [government entity] is
22 deliberately indifferent to the fact that racial discrimination is a highly predictable
23 consequence of the [inadequate training] [inadequate supervision] [inadequate screening
24 during the hiring process] [failure to adopt a needed policy].

25 [Note that an “official policy or custom” must be found only with respect to [government
26 entity]. This factor is not relevant to the liability of the individual defendants for acts of racial
27 discrimination.]¹

¹ For elaboration on any of the above grounds for finding a custom or policy, and for elaboration on the standard of deliberate indifference, see Instructions 4.6.4- 4.6.8.

1 **Comment**

2 Section 1981 applies against employers acting under color of State law. See 42 U.S.C. §
3 1981(c). Where a government employee brings a claim of racial discrimination in employment, there
4 can be an overlap of Section 1981 and Section 1983 protections. In *Jett v. Dallas Indep. School Dist.*,
5 491 U.S. 701, 731 (1989), the Supreme Court held that the remedial provisions of Section 1983
6 constituted the exclusive federal remedy for violations of rights enumerated in Section 1981 for
7 actions under color of State law. The Civil Rights Act of 1991 amended Section 1981 after the
8 decision in *Jett*, however; and the federal courts are in dispute over whether that Act established an
9 independent private cause of action under Section 1981 against employers acting under color of state
10 law for acts of racial discrimination. See, e.g., *Federation of African American Contractors v. City*
11 *of Oakland*, 96 F.3d 1204, 1214 (9th Cir.1996) (Civil Rights Act of 1991 restored a private right of
12 action under Section 1981 for racial discrimination in employment under color of state law); *Dennis*
13 *v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir.1995) (section 1983 continues as the exclusive
14 federal remedy for rights guaranteed in section 1981 by state actors); *Johnson v. City of Fort*
15 *Lauderdale*, 114 F.3d 1089 (11th Cir.1997) (following Fourth Circuit view).

16 The Third Circuit has yet to decide whether Section 1981 creates a private right of action for
17 employees subject to racial discrimination occurring under color of state law. See *Jones v. School*
18 *Dist. of Philadelphia*, 198 F.3d 403, 414-15 (3d Cir. 1999): (“We find it unnecessary to consider the
19 *Jett* issue as we are satisfied that a review of the evidence proffered in connection with Jones's
20 section 1981 claim demonstrates that it is insufficient to establish by a preponderance of the evidence
21 that the decision to request plaintiff's resignation was motivated by racial bias.”). District court
22 opinions within the Circuit are divided. See *Poli v. SEPTA*, 1998 WL 405052, *11-12 (E.D. Pa.
23 1998) (claim brought against municipal employer for racial discrimination in employment must be
24 brought under Section 1983); *Watkins v. PA Bd. of Probation and Parole*, 2002 WL 32182088, *4-6
25 (E.D. Pa. 2002) (holding that Section 1981 creates an implied right of action for local government
26 employees to recover for acts of racial discrimination).

27 The Committee worked under the assumption that Section 1981 can be used against local
28 government employers until the Third Circuit or the Supreme Court rules otherwise. But even if
29 Section 1981 provides a right of action for government employees, the government entity is not
30 liable unless the plaintiff can show that the acts of racial discrimination resulted from a custom or
31 policy. Even the courts that have found a private right of action under Section 1981 have determined
32 that the custom/policy requirement is fully applicable in Section 1981 actions, to protect the
33 government employer from respondeat superior liability. See *Watkins v. PA Bd. of Probation and*
34 *Parole*, 2002 WL 32182088, *6 (E.D. Pa. 2002) (“The Parole Board can be liable only if the action
35 alleged to be unconstitutional either implements or executes a policy statement, ordinance,
36 regulation, or decision officially adopted and promulgated by that body's officers or is visited
37 pursuant to governmental custom even though such a custom has not received formal approval
38 through the body's official decision-making channels.”); *Federation of African American*
39 *Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir.1996) (holding that while Section 1981
40 provides a private right of action against a government entity, “the policy and custom requirements
41 of *Monell* apply to section § 1981 claims against municipalities.”). Accordingly, this instruction

1 tracks the instruction on custom and policy found in the set of Section 1983 instructions. See
2 Instruction 4.6.3.

3 If the court wishes to give a more explicit instruction on a specific aspect of custom or policy,
4 it can use any of Instructions 4.6.4-8 that are applicable to the circumstances. *See also Hopp v. City*
5 *of Pittsburgh*, 194 F.3d 434, 440-41 (3d Cir. 1999) (noting that the question of who is a policy maker
6 is for the court, while the question of whether there was a policy that caused the deprivation is for
7 the jury; holding that it was error to instruct the jury in such a way as to imply that the government
8 entity could be held liable under the doctrine of respondeat superior).

1 **6.2.1 Section 1981 Definitions — Race**

2 **Model**

3 You must determine whether the discrimination, if any, was based on race, as it is only racial
4 discrimination that is prohibited by this statute under which [plaintiff] seeks relief. The parties
5 dispute whether [plaintiff] is a member of a “race” entitled to the protections of the statute. You are
6 instructed that the statute is intended to protect from discrimination identifiable classes of persons
7 who are subjected to intentional discrimination because of their ancestry or ethnic characteristics.
8 Such discrimination is racial discrimination that Congress intended to forbid, even if it would not
9 be classified as racial in terms of modern usage or scientific theory.

10 **Comment**

11 42 U.S.C. § 1981 prohibits racial discrimination. In *St. Francis College v. Al-Khazraji*, 481
12 U.S. 604, 609-10 (1987), the Court considered whether a person of Arab descent was entitled to the
13 protections of Section 1981. Defendants argued that the plaintiff was a Caucasian as that term is
14 commonly understood in modern usage. But the Court found that the question of race had to be
15 determined by reference to a different time period, i.e., the 19th Century, when Section 1981 was
16 enacted. “Plainly, all those who might be deemed Caucasian today were not thought to be of the
17 same race at the time § 1981 became law.” *Id.* The Court elaborated on the proper inquiry as follows:

18 In the middle years of the 19th century, dictionaries commonly referred to race as a
19 "continued series of descendants from a parent who is called the stock," N. Webster, *An*
20 *American Dictionary of the English Language* 666 (New York 1830) (emphasis in original),
21 "the lineage of a family," 2 N. Webster, *A Dictionary of the English Language* 411 (New
22 Haven 1841), or "descendants of a common ancestor," J. Donald, *Chambers' Etymological*
23 *Dictionary of the English Language* 415 (London 1871). . . . It was not until the 20th century
24 that dictionaries began referring to the Caucasian, Mongolian, and Negro races, 8 *The*
25 *Century Dictionary and Cyclopedia* 4926 (1911), or to race as involving divisions of
26 mankind based upon different physical characteristics. Webster's *Collegiate Dictionary* 794
27 (3d ed. 1916). Even so, modern dictionaries still include among the definitions of race "a
28 family, tribe, people, or nation belonging to the same stock." Webster's *Third New*
29 *International Dictionary* 1870 (1971); Webster's *Ninth New Collegiate Dictionary* 969
30 (1986).

31 Encyclopedias of the 19th century also described race in terms of ethnic groups,
32 which is a narrower concept of race than petitioners urge. *Encyclopedia Americana* in 1858,

1 for example, referred to various races such as Finns, vol. 5, p. 123, gypsies, 6 id., at 123,
2 Basques, 1 id., at 602, and Hebrews, 6 id., at 209. The 1863 version of the New American
3 Cyclopaedia divided the Arabs into a number of subsidiary races, vol. 1, p. 739; represented
4 the Hebrews as of the Semitic race, 9 id., at 27, and identified numerous other groups as
5 constituting races, including Swedes, 15 id., at 216, Norwegians, 12 id., at 410, Germans, 8
6 id., at 200, Greeks, 8 id., at 438, Finns, 7 id., at 513, Italians, 9 id., at 644-645 (referring to
7 mixture of different races), Spanish, 14 id., at 804, Mongolians, 11 id., at 651, Russians, 14
8 id., at 226, and the like. The Ninth edition of the Encyclopedia Britannica also referred to
9 Arabs, vol. 2, p. 245 (1878), Jews, 13 id., at 685 (1881), and other ethnic groups such as
10 Germans, 10 id., at 473 (1879), Hungarians, 12 id., at 365 (1880), and Greeks, 11 id., at 83
11 (1880), as separate races.

12 These dictionary and encyclopedic sources are somewhat diverse, but it is clear that
13 they do not support the claim that for the purposes of § 1981, Arabs, Englishmen, Germans,
14 and certain other ethnic groups are to be considered a single race. We would expect the
15 legislative history of § 1981 . . . to reflect this common understanding, which it surely does.
16 The debates are replete with references to the Scandinavian races, Cong. Globe, 39th Cong.,
17 1st Sess., 499 (1866) (remarks of Sen. Cowan), as well as the Chinese, id., at 523 (remarks
18 of Sen. Davis), Latin, id., at 238 (remarks of Rep. Kasson during debate of home rule for the
19 District of Columbia), Spanish, id., at 251 (remarks of Sen. Davis during debate of District
20 of Columbia suffrage), and Anglo-Saxon races, id., at 542 (remarks of Rep. Dawson). Jews,
21 ibid., Mexicans, see ibid. (remarks of Rep. Dawson), blacks, passim, and Mongolians, id.,
22 at 498 (remarks of Sen. Cowan), were similarly categorized. Gypsies were referred to as a
23 race. Ibid. (remarks of Sen. Cowan). Likewise, the Germans. . . .

24 Based on the history of § 1981, we have little trouble in concluding that Congress
25 intended to protect from discrimination identifiable classes of persons who are subjected to
26 intentional discrimination solely because of their ancestry or ethnic characteristics. Such
27 discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or
28 not it would be classified as racial in terms of modern scientific theory. The Court of
29 Appeals was thus quite right in holding that § 1981, "at a minimum," reaches discrimination
30 against an individual "because he or she is genetically part of an ethnically and
31 physiognomically distinctive subgrouping of homo sapiens." It is clear from our holding,
32 however, that a distinctive physiognomy is not essential to qualify for § 1981 protection. If
33 respondent on remand can prove that he was subjected to intentional discrimination based
34 on the fact that he was born an Arab, rather than solely on the place or nation of his origin,
35 or his religion, he will have made out a case under § 1981.

36 Note that Section 1981 does not prohibit racial discrimination that is solely on the basis of
37 location of birth (as distinct from ethnic or genetic characteristics). See *Bennun v. Rutgers State*
38 *Univ.*, 941 F.2d 154, 172 (3d Cir. 1991) ("Section 1981 does not mention national origin"); *King v.*
39 *Township of E. Lampeter*, 17 F. Supp. 2d 394, 417 (E.D. Pa. 1998) (holding that disparate treatment
40 on the basis of national origin was not within the scope of Section 1981). While the line between
41 race and national origin may in some cases be vague, it must be remembered that the Court in *St.*

1 *Francis College* intended that the term “race” be applied broadly. Thus, in *Schouten v. CSX*
2 *Transp., Inc.*, 58 F.Supp.2d 614, 617-18 (E.D. Pa. 1999), the court declared that “for purposes of
3 Section 1981, race is to be interpreted broadly and may encompass ancestry or ethnic
4 characteristics.”

6.2.2 Section 1981 Definitions — Hostile or Abusive Work Environment

Model

In determining whether a work environment is "hostile" you must look at all of the circumstances, which may include:

- The total physical environment of [plaintiff's] work area.
- The degree and type of language and insult that filled the environment before and after [plaintiff] arrived.
- The reasonable expectations of [plaintiff] upon entering the environment.
- The frequency of the offensive conduct.
- The severity of the conduct.
- The effect of the working environment on [plaintiff's] mental and emotional well-being.
- Whether the conduct was unwelcome, that is, conduct [plaintiff] regarded as unwanted or unpleasant.
- Whether the conduct was pervasive.
- Whether the conduct was directed toward [plaintiff].
- Whether the conduct was physically threatening or humiliating.
- Whether the conduct was merely a tasteless remark.
- Whether the conduct unreasonably interfered with [plaintiff's] work performance.

Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, occasional use of abusive language, tasteless jokes, and occasional teasing, does not constitute an abusive or hostile work environment. A hostile work environment can be found only if there is extreme conduct amounting to a material change in the terms and conditions of employment. Moreover, isolated incidents, unless extremely serious, will not amount to a hostile work environment.

It is not enough that the work environment was generally harsh, unfriendly, unpleasant, crude or vulgar to all employees. In order to find a hostile work environment, you must find that [plaintiff] was harassed because of [race]. The harassing conduct may, but need not be racially-based in nature. Rather, its defining characteristic is that the harassment complained of was linked to [plaintiff's]

1 [race]. The key question is whether [plaintiff], as a [plaintiff's race], was subjected to harsh
2 employment conditions to which [those other than members of the plaintiff's race] were not.

3 It is important to understand that, in determining whether a hostile work environment existed
4 at the [employer's workplace] you must consider the evidence from the perspective of a reasonable
5 [member of plaintiff's race] in the same position. That is, you must determine whether a reasonable
6 [member of plaintiff's race] would have been offended or harmed by the conduct in question. You
7 must evaluate the total circumstances and determine whether the alleged harassing behavior could
8 be objectively classified as the kind of behavior that would seriously affect the psychological or
9 emotional well-being of a reasonable [member of plaintiff's race]. The reasonable [member of
10 plaintiff's race] is simply one of normal sensitivity and emotional make-up.

11 **Comment**

12 This instruction can be used if the court wishes to provide a more detailed instruction on what
13 constitutes a hostile work environment than those set forth in Instructions 6.1.3 and 6.1.4. This
14 instruction is substantively identical to the definition of hostile work environment in Title VII cases.
15 See Instruction 5.2.1. The standards for a hostile work environment claim are identical under Title
16 VII and Section 1981. *See, e.g., Verdin v. Weeks Marine Inc.*, 124 Fed.Appx. 92, 94 (3d Cir. 2005)
17 (“Regarding Verdin's hostile work environment claim, the same standard used under Title VII
18 applies under Section 1981.”); *Ocasio v. Lehigh Valley Family Health Center*, 92 Fed.Appx. 876,
19 879-80 (3d Cir. 2004): (“As amended by the 1991 Civil Rights Act, § 1981 now encompasses hostile
20 work environment claims, and we apply the same standards as in a similar Title VII claim.”). Where
21 the plaintiff seeks recovery under both Title VII and Section 1981, this instruction may be given for
22 both causes of action.

23 For further commentary on the definition of a hostile work environment, see Instruction
24 5.2.1.

1 **6.2.3 Section 1981 Definitions — Constructive Discharge**

2 **Model**

3 [Plaintiff] claims that [he/she] was forced to resign due to [defendant’s] racially
4 discriminatory conduct. Such a forced resignation, if proven, is called a “constructive discharge.”

5 To hold [defendant] liable for [plaintiff’s] decision to resign, [plaintiff] must prove all of the
6 following by a preponderance of the evidence:

7 First: [Defendant] intentionally made [plaintiff’s] working conditions so intolerable that a
8 reasonable person would feel forced to resign; note that mere dissatisfaction with work
9 assignments, a feeling of being unfairly criticized, or difficult or unpleasant working
10 conditions are not necessarily so intolerable as to compel a reasonable person to resign.

11 Second: [Plaintiff’s] [race] was a motivating factor in defendant’s conduct.

12 Third: [Plaintiff] resigned from [his/her] position.

13 **Comment**

14 Both Section 1981 and Title VII prohibit racial discrimination that results in a constructive
15 discharge. The standards for determining a constructive discharge are identical. *See James v. Booz-*
16 *Allen & Hamilton, Inc.*, 368 F.3d 371, 374 (4th Cir. 2004) :

17 To establish constructive discharge, a plaintiff must be able to show that his former employer
18 deliberately made an employee’s working conditions intolerable, and thereby forced him to
19 quit. . . . Demotion can constitute a constructive discharge, especially where the demotion
20 is essentially a career-ending action or a harbinger of dismissal. . . . However, mere
21 dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or
22 unpleasant working conditions are not so intolerable as to compel a reasonable person to
23 resign.

24 Accordingly, this instruction is substantively identical to the constructive discharge instruction for
25 Title VII actions. See Instruction 5.2.2. Where the plaintiff seeks recovery under both Title VII and
26 Section 1981, this instruction may be given for both causes of action.

1 **6.3.1 Section 1981 Defenses — Bona Fide Occupational Qualification**

2 *No Instruction*

3 **Comment**

4 There is no BFOQ defense in racial discrimination cases. 42 U.S.C.A. § 2000e-2(e)(1). *See*
5 *Ferrill v. Parker Group*, 168 F.3d 468, 475 (11th Cir.1999) (no BFOQ defense to race-matched
6 telemarketing or polling).

1 **6.3.2 Section 1981 Defenses — Bona Fide Seniority System**

2 *No Instruction*

3 **Comment**

4 Title VII provides that “[n]otwithstanding any other provision of this subchapter, it shall not
5 be an unlawful employment practice for an employer to apply different standards of compensation,
6 or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . .
7 system, . . . provided that such differences are not the result of an intention to discriminate because
8 of race, color, religion, sex, or national origin . . .”42 U. S. C. § 2000e-2(h). In *Lorance v. AT & T*
9 *Technologies, Inc.*, 490 U.S. 900, 908-09 (1989), the Court stated that the plaintiff has the burden
10 of proving intentional discrimination and held that, as applied to seniority systems, the plaintiff must
11 prove that the seniority system is a means of intentional discrimination. Thus the existence of a bona
12 fide seniority system is not an affirmative defense; rather it is simply an aspect of the plaintiff’s
13 burden of proving discrimination. The standards for proving intentional discrimination are the same
14 for Title VII and Section 1981. *See Gunby v. Pennsylvania Electric Co.*, 840 F.2d 1108 (3d Cir.
15 1988). Accordingly, no instruction is included for any affirmative defense for a bona fide seniority
16 system.

6.4.1 Section 1981 Damages — Compensatory Damages — General Instruction

Model

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not [defendant] should be held liable.

If you find by a preponderance of the evidence that [defendant] intentionally discriminated against [plaintiff] by [describe conduct], then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate [him/her] for any injury [he/she] actually sustained as a result of [defendant's] conduct. The damages that you award must be fair compensation, no more and no less. The award of compensatory damages is meant to put [plaintiff] in the position [he/she] would have occupied if the discrimination had not occurred. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

[Plaintiff] must show that the injury would not have occurred without [defendant's] act [or omission]. Plaintiff must also show that [defendant's] act [or omission] played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of [defendant's] act [or omission]. This test — a substantial part in bringing about the injury — is to be distinguished from the test you must employ in determining whether [defendant's] actions were motivated by discrimination. In other words, even assuming that [defendant's] actions [or omissions] were motivated by discrimination, [plaintiff] is not entitled to damages for an injury unless [defendant's] discriminatory actions [or omissions] actually played a substantial part in bringing about that injury.

[There can be more than one cause of an injury. To find that [defendant's] act caused [plaintiff's] injury, you need not find that [defendant's] act was the nearest cause, either in time or space. However, if [plaintiff's] injury was caused by a later, independent event that intervened between [defendant's] act [or omission] and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably foreseeable by [defendant].]

In determining the amount of any damages that you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork.

You may award damages for any pain, suffering, inconvenience, mental anguish, or loss of enjoyment of life that [plaintiff] experienced as a consequence of [defendant's] [allegedly unlawful act or omission]. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award you make should be fair in light of the evidence presented at the trial.

1 I instruct you that in awarding compensatory damages, you are not to award damages for the
2 amount of wages that [plaintiff] would have earned, either in the past or in the future, if [he/she] had
3 continued in employment with [defendant]. These elements of recovery of wages that [plaintiff]
4 would have received from [defendant] are called “back pay” and “front pay”. [Under the applicable
5 law, the determination of “back pay” and “front pay” is for the court.] [“Back pay” and “front pay”
6 are to be awarded separately under instructions that I will soon give you, and any amounts for “back
7 pay”and “front pay” are to be entered separately on the verdict form.]

8 You may award damages for monetary losses that [plaintiff] may suffer in the future as a
9 result of [defendant’s] [allegedly unlawful act or omission]. [For example, you may award damages
10 for loss of earnings resulting from any harm to [plaintiff’s] reputation that was suffered as a result
11 of [defendant’s] [allegedly unlawful act or omission]. Where a victim of discrimination has been
12 terminated by an employer, and has sued that employer for discrimination, [he/she] may find it more
13 difficult to be employed in the future, or she may have to take a job that pays less than if the
14 discrimination had not occurred. That element of damages is distinct from the amount of wages
15 [plaintiff] would have earned in the future from [defendant] if [he/she] had retained her job.]

16 As I instructed you previously, [plaintiff] has the burden of proving damages by a
17 preponderance of the evidence. But the law does not require that [plaintiff] prove the amount of
18 [his/her] losses with mathematical precision; it requires only as much definiteness and accuracy as
19 circumstances permit.

20 [You are instructed that [plaintiff] has a duty under the law to "mitigate" [his/her] damages--
21 that means that [plaintiff] must take advantage of any reasonable opportunity that may have existed
22 under the circumstances to reduce or minimize the loss or damage caused by [defendant]. It is
23 [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you
24 by a preponderance of the evidence that [plaintiff] failed to take advantage of an opportunity that was
25 reasonably available to [him/her], then you must reduce the amount of [plaintiff’s] damages by the
26 amount that could have been reasonably obtained if [he/she] had taken advantage of such an
27 opportunity.]

28 [In assessing damages, you must not consider attorney fees or the costs of litigating this case.
29 Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore,
30 attorney fees and costs should play no part in your calculation of any damages.]

31 **Comment**

32 Compensatory damages are recoverable under Section 1981. *See Johnson v. Railway Express*
33 *Agency*, 421 U.S. 454, 460 (1975) (individual who establishes a cause of action under Section 1981
34 is entitled to both equitable and legal relief, including compensatory, and under certain

1 circumstances, punitive damages).

2 Compensatory damages may include emotional distress and humiliation as well as out-of-
3 pocket costs. *See, e.g., Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121-22 (3d Cir.1988)
4 (“General compensatory damages are available under §1981, and such damages may include
5 compensation for emotional pain and suffering.”). “The plaintiff must present evidence of actual
6 injury, however, before recovering compensatory damages for mental distress.” *Id.*

7 There is a right to jury trial for compensatory damages under Section 1981. *Laskaris v.*
8 *Thornburgh*, 733 F.2d 260, 263 (3d Cir. 1984). However, compensatory damages are to be
9 distinguished from awards of front pay and back pay, which constitute equitable relief. *Id.* (noting
10 that a claim for back pay is one for equitable relief, but that the plaintiff nonetheless had a right to
11 jury trial on his claims for compensatory damages). Where claims for back pay and front pay are
12 brought with claims for compensatory damages, the trial court may wish to use the jury as an adviser
13 on the amount to be awarded for back pay or front pay; alternatively, the parties may wish to
14 stipulate that the jury’s determination of back pay and front pay will be binding. In many cases it
15 is commonplace for back pay issues to be submitted to the jury. The court may think it prudent to
16 consult with counsel on whether the issues of back pay or front pay should be submitted to the jury
17 (on either an advisory or stipulated basis) or is to be left to the court’s determination without
18 reference to the jury.

19 For further comment on compensatory damages, see the Comment to Instruction 5.4.1.

20 *Attorney Fees and Costs*

21 There appears to be no uniform practice regarding the use of an instruction that warns the
22 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652
23 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if plaintiff
24 wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you
25 award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how
26 much. Therefore, attorney fees and costs should play no part in your calculation of any damages.”
27 *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the
28 instruction, and, reviewing for plain error, found none: “We need not and do not decide now whether
29 a district court commits error by informing a jury about the availability of attorney fees in an ADEA
30 case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons.” *Id.* at 657.
31 First, “it is not ‘obvious’ or ‘plain’ that an instruction directing the jury *not* to consider attorney fees”
32 is irrelevant or prejudicial; “it is at least arguable that a jury tasked with computing damages might,
33 absent information that the Court has discretion to award attorney fees at a later stage, seek to
34 compensate a sympathetic plaintiff for the expense of litigation.” *Id.* Second, it is implausible “that
35 the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the
36 disproportionate step of returning a verdict against him even though it believed he was the victim
37 of age discrimination, notwithstanding the District Court’s clear instructions to the contrary.” *Id.*;

1 *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and
2 *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

1 **6.4.2 Section 1981 Damages — Punitive Damages**

2 **Model**

3 [Plaintiff] claims the acts of [defendant] were done with malice or reckless indifference to
4 [plaintiff's] federally protected rights and that as a result there should be an award of what are called
5 "punitive" damages. A jury may award punitive damages to punish a defendant, or to deter the
6 defendant and others like the defendant from committing such conduct in the future. [Where
7 appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury, and
8 so receives nominal rather than compensatory damages.]

9 **For Individual Defendant:**

10
11 [An award of punitive damages is permissible against [name(s) of individual defendant(s)]
12 in this case only if you find by a preponderance of the evidence that [name(s) of individual
13 defendant(s)] personally acted with malice or reckless indifference to [plaintiff's] federally protected
14 rights. An action is with malice if a person knows that it violates the federal law prohibiting
15 discrimination and does it anyway. An action is with reckless indifference if taken with knowledge
16 that it may violate the law.]

17 **For Employer-Defendant:**

18 [However, punitive damages cannot be imposed on an employer where its employees acted
19 contrary to the employer's own good faith efforts to comply with the law by implementing policies
20 and procedures designed to prevent unlawful discrimination in the workplace.

21 An award of punitive damages against [employer] is therefore permissible in this case only
22 if you find by a preponderance of the evidence that a management official of [defendant] personally
23 acted with malice or reckless indifference to [plaintiff's] federally protected rights. An action is with
24 malice if a person knows that it violates the federal law prohibiting discrimination and does it
25 anyway. An action is with reckless indifference if taken with knowledge that it may violate the law.

26
27 **[For use where the defendant-employer raises a jury question on good-faith attempt**
28 **to comply with the law:**

29 But even if you make a finding that there has been an act of discrimination with malice or
30 reckless disregard of [plaintiff's] federal rights, you cannot award punitive damages if [defendant-
31 employer] proves by a preponderance of the evidence that it made a good-faith attempt to comply
32 with the law, by adopting policies and procedures designed to prevent unlawful discrimination such
33 as that suffered by [plaintiff].]

1 An award of punitive damages is discretionary; that is, if you find that the legal requirements
2 for punitive damages are satisfied [and that [employer-defendant] has not proved that it made a
3 good-faith attempt to comply with the law] then you may decide to award punitive damages, or you
4 may decide not to award them. I will now discuss some considerations that should guide your
5 exercise of this discretion.

6 If you have found the elements permitting punitive damages, as discussed in this instruction,
7 then you should consider the purposes of punitive damages. The purposes of punitive damages are
8 to punish a defendant for a malicious or reckless disregard of federal rights, or to deter a defendant
9 and others like the defendant from doing similar things in the future, or both. Thus, you may
10 consider whether to award punitive damages to punish [defendant(s)]. You should also consider
11 whether actual damages standing alone are sufficient to deter or prevent [defendant(s)] from again
12 performing any wrongful acts that may have been performed. Finally, you should consider whether
13 an award of punitive damages in this case is likely to deter others from performing wrongful acts
14 similar to those [defendant(s)] may have committed.

15 If you decide to award punitive damages, then you should also consider the purposes of
16 punitive damages in deciding the amount of punitive damages to award. That is, in deciding the
17 amount of punitive damages, you should consider the degree to which [defendant(s)] should be
18 punished for the wrongful conduct at issue in this case, and the degree to which an award of one sum
19 or another will deter [defendant(s)] or others from committing similar wrongful acts in the future.

20 [The extent to which a particular amount of money will adequately punish a defendant, and
21 the extent to which a particular amount will adequately deter or prevent future misconduct, may
22 depend upon a defendant's financial resources. Therefore, if you find that punitive damages should
23 be awarded against [defendant(s)], you may consider the financial resources of [defendant(s)] in
24 fixing the amount of those damages.]

25 **Comment**

26 In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975), the Supreme Court
27 held that a plaintiff in a Section 1981 action is entitled to punitive damages "under certain
28 circumstances." Unlike Title VII, which places caps on punitive damage awards, there is no such
29 statutory cap for Section 1981 actions.

30 Punitive damages may not be awarded against a municipality under Section 1981; nor may
31 they be awarded against hybrid agencies with substantial connections to government. *See generally*
32 *Evans v. Port Authority of New York and New Jersey*, 273 F.3d 346, 356-57 (3d Cir. 2001).

1 In *Kolstad v. American Dental Association*, 527 U.S. 526, 534-35 (1999), the Supreme Court
2 held that plaintiffs are not required to show egregious or outrageous discrimination in order to
3 recover punitive damages under Title VII. The Court read 42 U.S.C.A. § 1981a to mean, however,
4 that proof of intentional discrimination is not enough in itself to justify an award of punitive
5 damages, because the statute suggests a congressional intent to authorize punitive awards “in only
6 a subset of cases involving intentional discrimination.” Therefore, “an employer must at least
7 discriminate in the face of a perceived risk that its actions will violate federal law to be liable in
8 punitive damages.” *Kolstad*, 527 U.S. at 536. The Court further held that an employer may be held
9 liable for a punitive damage award for the intentionally discriminatory conduct of its employee only
10 if the employee served the employer in a managerial capacity, committed the intentional
11 discrimination at issue while acting in the scope of employment, and the employer did not engage
12 in good faith efforts to comply with federal law. *Kolstad*, 527 U.S. at 545-46. In determining whether
13 an employee is in a managerial capacity, a court should review the type of authority that the
14 employer has given to the employee and the amount of discretion that the employee has in what is
15 done and how it is accomplished. *Id.*, 527 U.S. at 543.

16 The *Kolstad* decision construed a 1991 amendment to Title VII that made punitive damages
17 available in Title VII actions for the first time. Thus it is not explicitly applicable to Section 1981
18 actions, as to which punitive damages have always been available. Nonetheless, the analysis in
19 *Kolstad* seems readily applicable to discrimination claims brought under Section 1981. As with Title
20 VII, the plaintiff should do something more than prove race discrimination to justify punitive
21 damages; otherwise every violation of Section 1981 would automatically qualify for a punitive
22 damages award. Similarly, punitive damages in a Section 1981 action should not be found against
23 an employer solely on the basis of respondeat superior.

24 Accordingly, the pattern instruction incorporates the *Kolstad* standards in the same fashion
25 as the instruction for Title VII actions. *See* Instruction 5.4.2. *See also* *Ross v. Kansas City Power*
26 *& Light Co.*, 293 F.3d 1041, 1048 (8th Cir.2002) (holding that the *Kolstad* standards apply to an
27 award of punitive damages under Section 1981); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431,
28 441 (4th Cir. 2000) (stating that “any case law construing the punitive damages standard set forth
29 in § 1981a, for example *Kolstad*, is equally applicable to clarify the common law punitive damages
30 standard with respect to a § 1981 claim”); *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th
31 Cir.2001) (applying *Kolstad* in a Section 1981 action and affirming a punitive damages award of
32 \$1,000,000 against an employer, where highly offensive language was directed at the plaintiff,
33 coupled by the abject failure of the employer to combat the harassment).

34 However, the instruction differs in one important respect from that to be employed in Title
35 VII cases: it takes account of the possibility that an employee might be subject to punitive damages
36 under Section 1981. In contrast, only employers can be liable under Title VII. Unlike employers,
37 employees would not be entitled to a defense for good faith attempt to comply with federal law.

38 The Supreme Court has imposed some due process limits on both the size of punitive
39 damages awards and the process by which those awards are determined and reviewed. In

1 performing the substantive due process review of the size of punitive awards, a court must consider
2 three factors: “the degree of reprehensibility of” the defendant’s conduct; “the disparity between the
3 harm or potential harm suffered by” the plaintiff and the punitive award; and the difference between
4 the punitive award “and the civil penalties authorized or imposed in comparable cases.” *BMW of*
5 *North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

6 For a complete discussion of the applicability of the *Gore* factors to a jury instruction on
7 punitive damages, see the Comment to Instruction 4.8.3.

1 **6.4.3 Section 1981 Damages — Back Pay— For Advisory or Stipulated Jury**

2 **Model**

3 If you find that [defendant-employer] intentionally discriminated against [plaintiff] in
4 [describe employment action] [plaintiff], then you must determine the amount of damages that
5 [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a
6 preponderance of the evidence.

7 You may award as actual damages an amount that reasonably compensates [plaintiff] for any
8 lost wages and benefits, taking into consideration any increases in salary and benefits, including
9 pension, that [plaintiff] would have received from [defendant] had [plaintiff] not been the subject
10 of [defendant's] intentional discrimination.

11 Back pay damages, if any, apply from the time [plaintiff] was [describe adverse employment
12 action] until the date of your verdict.

13 You must reduce any award by the amount of the expenses that [plaintiff] would have
14 incurred in making those earnings.

15 If you award back pay, you are instructed to deduct from the back pay figure whatever wages
16 [plaintiff] has obtained from other employment during this period. However, please note that you
17 should not deduct social security benefits, unemployment compensation and pension benefits from
18 an award of back pay.

19 [You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is
20 [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her]
21 damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant]
22 persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially
23 equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award
24 of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had
25 obtained those opportunities.]

26 **[Add the following instruction if the employer claims “after-acquired evidence” of misconduct**
27 **by the plaintiff:**

28 [Defendant-employer] contends that it would have made the same decision to [describe
29 employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the
30 employment decision. Specifically, [defendant] claims that when it became aware of the [describe
31 the after-discovered misconduct], [defendant] would have made the decision at that point had it not
32 been made previously.

1 If [defendant] proves by a preponderance of the evidence that it would have made the same
2 decision and would have [describe employment decision] [plaintiff] because of [describe after-
3 discovered evidence], you must limit any award of back pay to the date [defendant] would have
4 made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired
5 information.]

6 **Comment**

7 Back pay awards are available against an employer under Section 1981. *See Johnson v. Ry*
8 *Express Agency, Inc.*, 421 U.S. 454, 459 (1975). A backpay award under Section 1981 is not
9 restricted to the two years specified for backpay recovery under Title VII. *Id.*

10 An award of back pay is an equitable remedy; thus there is no right to jury trial on a claim
11 for back pay. *See Laskaris v. Thornburgh*, 733 F.2d 260, 263 (3d Cir. 1984) (noting that a claim for
12 back pay is one for equitable relief, but that the plaintiff nonetheless had a right to jury trial on his
13 claims for compensatory damages); *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001)
14 (noting that front pay and back pay are equitable remedies).

15 An instruction on back pay is nonetheless included because the parties or the court may wish
16 to empanel an advisory jury—especially given the fact that in most cases the plaintiff will be seeking
17 compensatory damages and the jury will be sitting anyway. *See Fed. R.Civ.P. 39(c)*. Alternatively,
18 the parties may stipulate to a jury determination on back pay, in which case this instruction would
19 also be appropriate. Instruction 6.4.1, on compensatory damages, instructs the jury in such cases to
20 provide separate awards for compensatory damages, back pay, and front pay.

21 For further commentary on back pay, see the Comment to Instruction 5.4.3.

1 **6.4.4 Section 1981 Damages — Front Pay — For Advisory or Stipulated Jury**

2 **Model**

3 You may determine separately a monetary amount equal to the present value of any future
4 wages and benefits that [plaintiff] would reasonably have earned from [defendant-employer] had
5 [plaintiff] not [describe adverse employment action] for the period from the date of your verdict
6 through a reasonable period of time in the future. From this figure you must subtract amount of
7 earnings and benefits [plaintiff] will receive from other employment during that time. [Plaintiff] has
8 the burden of proving these damages by a preponderance of the evidence.

9 [If you find that [plaintiff] is entitled to recovery of future earnings from [defendant], then
10 you must reduce any award by the amount of the expenses that [plaintiff] would have incurred in
11 making those earnings.]

12 You must also reduce any award to its present value by considering the interest that
13 [plaintiff] could earn on the amount of the award if [he/she] made a relatively risk-free investment.
14 The reason you must make this reduction is because an award of an amount representing future loss
15 of earnings is more valuable to [plaintiff] if [he/she] receives it today than if it were received at the
16 time in the future when it would have been earned. It is more valuable because [plaintiff] can earn
17 interest on it for the period of time between the date of the award and the date [he/she] would have
18 earned the money. So you should decrease the amount of any award for loss of future earnings by
19 the amount of interest that [plaintiff] can earn on that amount in the future.

20 **[Add the following instruction if defendant claims “after-acquired evidence” of misconduct**
21 **by the plaintiff:**

22 [Defendant-employer] contends that it would have made the same decision to [describe
23 employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the
24 employment decision. Specifically, [defendant] claims that when it became aware of the [describe
25 the after-discovered misconduct], [defendant] would have made the decision at that point had it not
26 been made previously.

27 If [defendant] proves by a preponderance of the evidence that it would have made the same
28 decision and would have [describe employment decision] [plaintiff] because of [describe after-
29 discovered evidence], then you may not award [plaintiff] any amount for wages that would have been
30 received from [defendant] in the future.]

1 **Comment**

2 An award of front pay is an equitable remedy, as it provides a substitute for reinstatement.
3 *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 260-61 (3d Cir. 1986) (noting that
4 “when circumstances prevent reinstatement, front pay may be an alternate remedy”). Thus there is
5 no right to a jury trial for a claim for front pay.

6 An instruction on front pay is nonetheless included because the parties or the court may wish
7 to empanel an advisory jury—especially given the fact that in most cases the plaintiff will be seeking
8 compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c). Alternatively,
9 the parties may stipulate to a jury determination on front pay, in which case this instruction would
10 also be appropriate. See *Feldman v. Philadelphia Housing Auth.*, 43 F.3d 823, 832 (3d Cir.1994)
11 (upholding a jury’s determination of the amount of front pay due the plaintiff in a Section 1983
12 employment action). Instruction 6.4.1, on compensatory damages, instructs the jury in such cases to
13 provide separate awards for compensatory damages, back pay, and front pay.

14
15 In *Monessen S.R. Co. v. Morgan*, 486 U.S. 330, 339 (1988), the Court held that “damages
16 awarded in suits governed by federal law should be reduced to present value.” (Citing *St. Louis*
17 *Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 412 (1985). The "self-evident" reason is that "a
18 given sum of money in hand is worth more than the like sum of money payable in the future." The
19 Court concluded that a "failure to instruct the jury that present value is the proper measure of a
20 damages award is error." *Id.* Accordingly, the instruction requires the jury to reduce the award of
21 front pay to present value. It should be noted that where damages are determined under state law, a
22 present value instruction may not be required under the law of certain states. See, e.g., *Kaczowski*
23 *v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980) (advocating the "total offset" method, under
24 which no reduction is necessary to determine present value, as the value of future income streams
25 is likely to be offset by inflation).

6.4.5 Section 1981 Damages — Nominal Damages

Model

If you return a verdict for [plaintiff], but [plaintiff] has failed to prove actual injury and therefore is not entitled to compensatory damages, then compensatory damages, then you must award nominal damages of \$ 1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if [he/she] suffered no actual injury. Nominal damages (of \$1.00) are designed to acknowledge the deprivation of a federal right, even where no actual injury occurred.

However, if you find actual injury, you must award compensatory damages (as I instructed you), rather than nominal damages.

Comment

Nominal damages may be awarded under Section 1981. *See Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250, 1259 (6th Cir.1985) (award of nominal damages proper in absence of absent proof of compensable injury) An instruction on nominal damages is proper when the plaintiff has failed to present evidence of actual injury. However, when the plaintiff has presented evidence of actual injury and that evidence is undisputed, it is error to instruct the jury on nominal damages, at least if the nominal damages instruction is emphasized to the exclusion of appropriate instructions on compensatory damages. Thus, in *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 452 (3d Cir. 2001), the district court granted a new trial, based partly on the ground that because the plaintiff had presented “undisputed proof of actual injury, an instruction on nominal damages was inappropriate.”

In upholding the grant of a new trial, the Court of Appeals noted that “nominal damages may only be awarded in the absence of proof of actual injury.” *See id.* at 453. The court observed that the district court had “recognized that he had erroneously instructed the jury on nominal damages and failed to inform it of the availability of compensatory damages for pain and suffering.” *Id.* Accordingly, the court held that “[t]he court's error in failing to instruct as to the availability of damages for such intangible harms, coupled with its emphasis on nominal damages, rendered the totality of the instructions confusing and misleading.” *Id.* at 454.

Nominal damages may not exceed one dollar. *See Mayberry v. Robinson*, 427 F. Supp. 297, 314 (M.D.Pa.1977) (“It is clear that the rule of law in the Third Circuit is that nominal damages may not exceed \$1.00.”) (citing *United States ex rel. Tyrrell v. Speaker*, 535 F.2d 823, 830 (3d Cir.1976)).